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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 329.

OVE SKOU REDERI A/S, a Corporation, and the SS BIRGITTE SKOU, Her Engines, Hull, Tackle, Cargo, and Appurtenances Thereof,
Petitioners,

versus

JOHN L. MARSHALL,
Respondent,

THE TRAVELERS INSURANCE COMPANY, a Corporation,
Intervenor.

BRIEF

Of Respondent in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Textbook Cited.

Norris, Maritime Personal Injuries, Second Edition, p. 71 5

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versus

JOHN L. MARSHALL, Respondent,

THE TRAVELERS INSURANCE COMPANY, a Corporation, Intervenor.

BRIEF

Of Respondent in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE.

The usual cry that this case will make the vessel an insuror in respect to injuries sustained by longshoremen is somewhat amusing coming from the Defense Counsel in Mobile, Alabama.

The Port of Mobile was the seventh largest port in the United States, cargo-wise, in 1965; fourth largest in imports alone. It has been twenty years since **Seas Shipping Company, Inc. v. Sieracki**, 328 U. S. 85 (1946), and

there has only been one litigated longshoreman's case, either jury or non-jury, where a verdict has been returned for the longshoreman. The one decision in favor of the longshoreman, was a non-jury case involving the breaking of a line. It might be argued that this situation is due in part to inadequate counsel for the Plaintiff in maritime personal injury cases, but I like to think otherwise. All of the longshoremen in the Port of Mobile are Negroes and this is a factor that has helped to bring about this unwholesome result. The makeup of our juries in the United States District Court for the Southern District of Alabama is such that it is impossible to have a Negro sitting on the jury in a Negro personal injury case. It is our feeling that the all-white juries, in this day and time, are capable of discriminating against the Negro. However, we do not wish to infer that our District Judge is capable of such discrimination, but it is our feeling that he has had difficulty in accepting the Doctrine of Seaworthiness, a doctrine which imposes liability without a showing of fault. Therefore, to us, it is somewhat amusing when the Defense Counsel from the Port of Mobile cries "that you are making the vessel an insuror" on the loss of their second case, this one by way of appeal to the Fifth Circuit Court of Appeals.

The Court below made no Finding of Fact that the chain strap was seaworthy. In its Conclusions of Law, the Court states:

> "The chain slings in use on the SS BIRGITTE SKOU cannot therefore be considered unseaworthy in light of the current standards. The equipment used was customary in this operation. The proof did not show that what was customary was not reasonable."

I suppose that the foregoing would have to be construed as a backhanded conclusion or a qualified conclusion that the chain straps were in fact seaworthy.

In concluding that the chain straps in use were customary in this operation, the Court chose to ignore completely a substantial portion of the evidence.

At the time Marshall was injured, at approximately 1:15 p. m., they were loading into the hold of the vessel a large painted I-beam of approximately 30 to 40 feet in length and weighing approximately two tons. The length of the beam was such that it could not be brought into the hold on a level plane, making it necessary that it be brought into the hold at an angle generally described as approximately a 45 degree angle. The gear being used at the time in question were chain slings; although the evidence is practically unanimous that the use of wooden chocks between the beam and the chain slings would help create traction there were no wooden chocks being used at the time John Marshall was injured and no finding by the Court in respect to same. The angular descent into the hold was effected by wrappi one chain twice around the high end of the beam and taking the hook back to the chain and by taking a single turn around the lower end of the beam and taking the hook back to the chain. The I-beam in question was secured in the manner above described, lifted off the dock smoothly, and as it got over the hold of the ship it slipped from the chains, falling with great force into the hold, striking another beam on which the Respondent was standing (as far away from the hatch square as he could get), causing an upward jolt of the struck beam, seriously fracturing the right ankle of the Respondent. As a result of said injuries, Respondent has a fifty per cent permanent disability of the right lower extremity.

From the beginning we have felt quite strongly about the merits of this case. It has been our feeling that certainly if there was ever a case of defective or unseaworthy gear arising out of the Port of Mobile, Alabama,

that this was it. Admittedly, we are strictly laymen when it comes to loading ships or handling steel, but to us, common sense dictates that it is inconceivable that the handling of a large I-beam such as is this case with chains and without benefit of wooden chocks could be considered a safe and seaworthy method.

Is a chain that is incapable of or inadequate to hold its load any less unseaworthy than a chain that breaks under the pressure of its load? We submit that in either instance the inadequacy of the chain would constitute unseaworthiness.

ARGUMENT.

Point I.

Best or safest appliances.

Even though the opinion of the Court of Appeals expressly does not require the best or safest appliances, the Petitioner seems to be relying quite heavily on those cases that have stated that the best or safest appliances are not required in these cases, **Doucette v. Vincent**, 194 F. 2d 834, and other cases with such language. We concede that we are unable to cite an authority that holds that the vessel has an obligation to furnish the best gear and equipment available. We submit, however, that many cases have arrived at this result by a simple holding that the gear or equipment then and there being used was in fact inadequate for its intended purpose. Norris' **Maritime Personal Injuries**, Second Edition, p. 71, states:

> "The appliance, gear or equipment must be adequate for the purpose for which it is ordinarily used and its inadequacy renders it unseaworthy."

In such a hazardous occupation and in particular in such a hazardous undertaking as was involved in this case, we would like to pose the question, what would be so terribly wrong or would it be so terribly burdensome to require that the vessel use the best or safest gear and equipment?

Point II.

Seaworthiness may be a question of law.

Although we urged in the District Court, we urged in the Court of Appeals, we again urge here and we will continue to feel that a careful reading of the evidence in this case by anyone who comprehends the Doctrine of Seaworthiness leads to but one conclusion, and that is a con-

clusion of unseaworthiness. We naturally agree with the opinion of the Court of Appeals that the facts as found by the District Court constitute unseaworthiness as a matter of law.

The question of seaworthiness may be a question of law. **Walker v. Harris**, 335 F. 2d 185, cert. den. 379 U. S. 930, 85 S. Ct. 326; **United States Lines Company v. Williams**, 365 F. 2d 332; **Jefferson v. Taiyo Katun K. K.**, 310 F. 2d 582, cert. den. 372 U. S. 967, 83 S. Ct. 326; **Mills v. Mitsubishi Shipping Company**, 358 F. 2d 609.

In **Walker v. Harris**, supra, p. 191, the test in arriving at the question of unseaworthiness is as follows:

> "The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: What is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful, or prudent the owner might have been. Mitchell v. Trawler Racer, Inc., 1960, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, 1960 AMC 1503".

Mills v. Mitsubishi Shipping Company, supra, involved the same issues of law that are involved in the present case. In the **Mills** case, the Court stated:

> "In either case, the winch while under normal, expected use, with no proof that it was either being mishandled, abused or operated improperly, failed to perform the function for which it existed.
>
> "This is the classic case of unseaworthiness, a concept which has been phrased in a number of ways.
>
> • • • • • • •

"But under no stretch of the imagination is a winch with shift lever reasonably fit if, at a critical point in the handling of the draft, the lever shakes so violently that the operator is thrown off the seat, is injured, cannot control the load, or all three."

We wonder, if under any stretch of the imagination, chain straps being used to handle a forty foot beam at an angle could be considered reasonably fit if, at a critical point in the handling of the draft the chain straps do not hold their load, but permit it to fall into the hatch with great force, thus injuring the longshoreman?

As stated by Judge Godbold in the opinion, p. 11, this case is similar to **Van Carpals v. S. S. American Harvester**, 297 F. 2d 9 (2d Cir.), cert. den., 369 U. S. 865, 82 S. Ct. 1031. **Van Carpals** was reversed by the Court of Appeals holding that there was unseaworthiness as a matter of law, saying:

"We disagree and hold that under prevailing law the vessel must be held unseaworthy. Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the value was actually not in a safe condition for the work needed to be done upon it. The trial court believed that the independent tests made to double check the gauges and the fact that libelant saw no signs of pressure negated an unseaworthy condition. But we do not think that follows. The accident occurred; there was steam in the valve; and it erupted. These conceded physical facts imperatively required a finding of unfitness for the task in hand. Thus a conclusion of unseaworthiness should have been reached irrespective of the proofs tending to absolve the owner of negligence."

* * * * * * *

"Under the circumstances here disclosed of substantial injury from a failure of the ship's machinery,

which demonstrates that it was unfit for its intended use, the breach of duty is clear."

Point III.

The substantive law in this case is not in conflict with the applicable decisions of this Court or of any of the Circuits.

This case as we read it, does not disrupt any of the accepted doctrines or pronouncements relating to the law of seaworthiness. It does not abolish "reasonable fitness", it does not make the vessel an insuror; nor does it dictate that the vessel use the best or safest gear or equipment. This case simply holds, as we read it, that the hazards were great, that such hazards were foreseeable and that the sling employed by the Petitioner did not perform its single function of retaining its load. In the language of this Court:

> "It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used . . . Its inadequacy rendered it unseaworthy." Mahnich v. Southern Steamship Company, 321 U. S. 96, 88 L. Ed. 561.

Petitioner appears to rely heavily upon **Phipps v. N. V. Nederlandsche Amerikaansche, S. M.**, 259 F. 2d 143, and **Billeci v. United States**, 298 F. 2d 703. In reading **Phipps**, it appears that the longshoreman in this case was injured when a sling load of lumber being brought into the hold on the "quarter" allowed some of the lumber to slip out, thus injuring the longshoreman. In reading the report, it does not reflect the type of straps that were being used; there appears to be no contention that the straps were in any manner defective, nor does there appear to be any contention that the draft or load of cargo was in any manner defective. The case would indicate that the Libelant was endeavoring to predicate liability solely on the proposition that they should not have been bringing lumber

into the hold on the "quarter" and that they should have had a larger hatch opening. Language used therein, to us, would seem to be of little or no significance.

In **Billeci**, the winch operator had shifted gears of the winch and failed to replace the pin locking the winch in gear before proceeding with the operation, thus injuring the longshoreman. This case was not appealed as far as we are able to determine and to us would seem to be in direct conflict with this Court in **Crumady v. The Joachim Fisser**, 358 U. S. 423, 3 L. Ed. 2d 413. This Court stated in **Crumady**:

> "There is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch and appurtenance of the vessel was not inherently defective as was the rope in the Mahnich case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand. . . . In this case the winch, makes the vessel pro tanto unseaworthy. That was the theory of the District Court; it correctly applies the concept of unseaworthiness."

Phipps and **Billeci**, both Ninth Circuit Court cases, were followed in the Ninth Circuit by **Blassingill v. Waterman Steamship Corporation**, 336 F. 2d 367; and **Beeler v. Alaska Aggregate Corporation**, 336 F. 2d 108, which we feel completely reverses the language used by the Ninth Circuit in **Phipps** and **Billeci**. **Blassingill** involved the discharging of bales of burlap sacks and the overloading of the cargo being discharged, thus injuring the longhoresman. The Court made an extensive review of the gear-handling cases and ruled in substance that the employment of an unsafe method of unloading would render the vessel unseaworthy, stating at p. 369:

> "The tackle, however, was defective only in the sense that it did not perform the work for which it

was used. So here, the tackle was safe when used to handle two bales. The jury confirmed that it was unsafe when used to handle four."

In **Ferrante v. Swedish-American Lines**, 331 F. 2d 571, cert. den. 379 U. S. 1002, the Third Circuit Court of Appeals questions and repudiates **Billeci** as well as several other cases of like holding including **Puddu v. Royal Netherlands Steampship Company**, 303 F. 2d 752. **Ferrante** involved a double draft of plywood boards being removed from the hold of the vessel with rope slings which were adequate for a single draft. The trial court ruled against the Libelant and it was urged on appeal that the case was governed by **Billeci** and **Puddu**. The Court is quoted as follows:

"A stevedore's negligent or unsafe use of ships' seaworthy equipment makes the ship unseaworthy. . . . A longshoreman's negligent method of discharging cargo makes the ship unseaworthy. . . . In the instant case the district court found negligent the stevedore's method of assembling two piles of plywood boards side by side to make a sling load. Whether the operation is regarded as stowage of the piles of boards as part of the discharge process, or the construction of a draft, or as the mere use of the ship's equipment, the manila ropes, the fact remains that the stevedore failed to perform safely, a basis for liability including negligent and non-negligent conduct alike, and that made the ship unseaworthy."

The decision of Judge Godbold, p. 14, reads:

"In **Vega v. The Malula**, 291 F. 2d 415 (5th Cir., 1961), a sheave came out of a block when a pin unaccountably slipped out. This Court held:

'The event occurred. The block failed. The block failed while being used for a normal expected purpose. That is, and has been, at least since Sierazki

[Sic] in 1947, a classic case of patent unseaworthiness. The passage of time has but made the warranty of seaworthiness more awesome as it extends to gear used without regard to ownership and to transitory conditions (Citations). How the pin happened to slip out is of no real legal significance. No matter how much care was used either by the owner, the ship's crew, or the deceased crew member immediately responsible for its maintenance, the failure of the block under normal expected use visits on the vessel owner an unremitting liability based on the breach of the absolute duty.' "

CONCLUSION.

It is felt that it has been effectively shown that no conflict exists in this case or could exist under the facts of this case with any other decision of the Court of Appeals. In addition, it is submitted that the Petition fails in its entirety in its efforts to establish any special and important reasons for the granting of same. It is therefore respectfully requested that the Petition for Writ of Certiorari be denied.

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Affidavit of Service.

I, Ross Diamond, Jr., Attorney for Respondent, depose and say that on the ..... day of ....., 1967,

I served a copy of the foregoing Brief in opposition to Petition for Writ of Certiorari on the Petitioners herein by delivering a copy of same to Robert F. Arams, counsel of record for said Petitioner, at his office in the Merchants National Bank Building, Mobile, Alabama.

.....

Ross Diamond, Jr.

Subscribed and Sworn to before me at Mobile, Alabama, this ..... day of ....., 1967.

.....

Notary Public, Mobile County, Alabama.